No. 98-1161

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF ERIE, PA., *et al.*,

Petitioners,

—v.—

PAP'S A.M.,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF OF MORALITY IN MEDIA, INC. NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, AND FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Morality in Media, Inc. ("MIM"), the National Law Center for Children and Families, Inc. ("NLC"), and the Family Research Council ("FRC") as *Amici Curiae*, file this brief in support of the Petitioners in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the Petitioners and Respondent have been requested and all parties have consented thereto in writing. Copies of the written consents are being filed concurrently with this brief.

MIM is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. It's Board of Directors and Advisory Board are composed of prominent businessmen, clergy and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link, produced the "Hill-Link Minority Report" of the Commission, which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 at 58, notes 7 and 8 (1973). More recently MIM has filed friend of the court briefs in this Court involving First Amendment issues, including; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 116 S.Ct. 2374 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment For The Arts v. Finley*, 524 U.S. 569 (1998).

NLC is a Virginia, non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries. The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. NLC has filed numerous friend of the court briefs in this Court and in other federal and state cases involving First Amendment issues, including; *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), and *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), and *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996) (computer BBS obscenity); *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) (prison pornography regulations); *Free Speech Coalition v. Reno*, N.D. Cal. 1997), unpublished, No. C97-028SC, 1997 WL 487758, and Ninth Circuit No. 97-16536 (argued Mar. 10, 1998) (computerized child pornography, 18 U.S.C. 2252A); *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996) (Communications Decency Act, "CDA"); *City of National City v. Wiener*, 838 P.2d 223 (Cal. 1992) (sexually oriented business zoning); and *State v. Harrold*, 593 N.W.2d 299 (Neb. 1999) (obscene act on public access cable TV). NLC's Chief Counsel has also filed several briefs with this Court, including: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography);

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) (obscenity nuisance); *California v. Freeman*, 488 U.S. 1311 (1989) (prostitution in pornography production); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (RICO-obscenity); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented business regulation); *Reno v. ACLU*, 521 U.S. 844 (1997) (*Brief for Members of Congress* re: CDA), and presented oral argument to this Court in *Flynt v. Ohio*, 451 U.S. 619 (1981).

FRC is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens. FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice on the unique relationship between parents and their children. The expertise of the FRC has been of particular importance to members of the United States Congress. Sen. Dan Coats, (*R-IN*) recently recognized the assistance that the FRC has provided for his staff, "[Y]ou've done marvelous work here defining the issues for us, being such a help to our staff, and it's just been a great pleasure working with you." Sen. Rick Santorum, (*R-PA*) has also cited similar assistance from the FRC on particularly "difficult issues". Rep. Tony Hall, (*D-OH*) stated, "The Council's work is vitally important since the root of many of our nation's problems is the breakdown of the family. The family is the bedrock of society and I salute FRC for its efforts to strengthen it." FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court and

federal courts. Charles A. Donovan is the Executive Vice President and acting C.E.O. Janet M. LaRue is the Senior Director of Legal Studies.

Amici are filing this brief in support of the Petitioners because they believe their brief contains relevant matter that may not be brought to the attention of the Court by the parties.

SUMMARY OF ARGUMENT

Amici argue that the Pennsylvania Supreme Court erred in determining that the Erie public indecency ordinance is unconstitutional in violation of the First Amendment to the U.S. Constitution. *Amici* contend that disregarding *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), as the controlling Supreme Court case on point is incorrect because both the result of the majority judgment, along with the controlling plurality opinion, are to be given precedential value. In reaching this conclusion, your *amici* maintain that the State's highest Court erred below in concluding that "no clear precedent arises out of *Barnes*" and, therefore, failing to afford precedential weight to this Court's judgment. These *amici* submit that this Court has provided guidance for the lower courts to interpret which opinion or opinions are controlling precedent in "plurality decisions".[1] Since this Court in *Barnes* upheld the Indiana public indecency statute, the State Court below should have relied on that precedent to uphold the constitutionality of the legally identical Erie ordinance, even on the narrowest grounds of any of the opinions in support of the majority judgment.

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[1] "Plurality decisions, also called no-clear-majority decisions, are those in which a majority of the Court agrees upon the judgment but not upon a single rationale to support the result." Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 756 (1980).

The "plurality opinion" is often referred to as the "opinion designated as the lead opinion of the Court, which is not always the opinion subscribed to by the largest number of Justices." *Id.*

ARGUMENT

I. The Majority Judgment and Plurality Opinion in *Barnes v. Glen Theatre, Inc.*, have Precedential Value that a Common Law Public Indecency Law is Constitutionally Valid.

This Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), represents the majority judgment of five Justices of this Court that Indiana's common law public indecency statute is a constitutionally valid proscription on indecent nude conduct in public places. In the primary opinion announcing the judgment of the Court, Chief Justice Rehnquist and Justices O'Connor and Kennedy held that the statute was valid and based their opinion on the substantial state interests in public morality and order and the protection of the public from indecent conduct. A fourth Justice joined in the judgment, by the concurrence of Justice Scalia, who reasoned that the statute was constitutional because such indecent nude dancing is pure conduct which is not entitled to First Amendment protection. Accordingly, moral opposition to nudity provides a rational basis that fully justifies the State's prohibition on such commercial exploitation of nudity in strip bars and other such places of public sexual exploitation. A fifth Justice joined in the judgment, by the concurrence of Justice Souter, who concluded that the well known harmful secondary effects of the sexual exploitation business is sufficient to justify prohibiting such indecent nude dancing in "adult entertainment" establishments. Both Justice Scalia and Justice Souter referred to the lead opinion as that of the "plurality" and these *amici* submit that the opinion of Justices Rehnquist, O'Connor, and Kennedy constitutes the "controlling plurality opinion" in *Barnes* and that the majority judgment of *Barnes* is the law of the case with

binding precedential value over all lower federal and state courts under our system of jurisprudence.

In a pre-enforcement civil challenge to the City of Erie's public indecency ordinance, the Court of Common Pleas enjoined its enforcement, but the Commonwealth Court reversed and upheld the constitutionality of the law in *Pap's A.M. t/d/b/a Kandyland v. The City of Erie, et al.*, 674 A.2d 338 (Pa. Commw. 1996). In reversing the Commonwealth Court, the Supreme Court of Pennsylvania held that the Erie ordinance violated the United States Constitution because it failed to pass a strict scrutiny analysis in light of that Court's determination that the ordinance was a content-based, unconstitutional restriction on speech protected by the First Amendment. *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998).[2]

In reaching this determination, the Court below erroneously concluded that no rationale in *Barnes* should be accorded precedential value because there was "no point on which a majority of the *Barnes* Court agreed".[3] Having held no governing rationale existed in the "hopelessly fragmented" *Barnes* decision, the State Court below went on to disregard the resulting majority judgment of *Barnes* which held a legally indistinguishable statute constitutionally valid under the substantial interest level of scrutiny analysis as laid out in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The Pennsylvania Supreme Court then chose to follow the minority dissent in applying a strict scrutiny analysis, which these *amici* submit is erroneous, as against the controlling majority determination that strict scrutiny is inapplicable to the type of public nudity law involved, even assuming some measure of First Amendment protection is warranted for the sake of analysis.

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[2] *Pap's A.M.*, 719 A.2d at 279-80.
[3] *Id.* at 278.

The Pennsylvania Supreme Court recognized that the statute in *Barnes* and the Erie ordinance in the instant case are "strikingly similar" or "virtually identical", in that both laws prohibit public nudity in public places while not banning all nudity or otherwise erotic dancing as such.[4]

A. Application of *Barnes* to the Facts in the Instant Case

In *Barnes*, the plurality opinion utilized the four part *O'Brien* test as a legal standard which could be applied to laws governing indecent public conduct if a speech element were found or assumed. The Court then applied this test to the Indiana public indecency law, holding the prohibition on totally nude dancing constitutional. It is clear from decisions handed down by this Court, as well as those of the Third Circuit,[5] that precedential weight has been given to *Barnes* regarding the analysis under such an intermediate level of scrutiny and for the specific majority result.[6]

[4] "The Court in *Barnes* analyzed an Indiana statute, which is strikingly similar to the Ordinance we are examining, to determine whether that statute violated the First Amendment." *Id.* at 277.

[5] United States Supreme Court cases: *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Turner Broadcasting System v. FCC*, 512 U.S. 622, (1994); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Third Circuit Court of Appeals cases: *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997); *Pro v. Donatucci*, 81 F.3d 1283 (3rd Cir. 1996); *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 10 F.3d 123 (3rd Cir. 1993).

[6] However, your *amici* disagree with the choice in some decisions to treat Justice Souter's rationale as somewhat more binding than that of the plurality's.

In *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 646 (M.D. Fla. 1994), the District Court upholding the county public nudity ordinance, requiring more covering than the Indiana statute,

Justice Souter agreed with the plurality that the *O'Brien* test is the applicable level of scrutiny and that it would be satisfied when applied, but stated, in *Barnes* at 582, his rationale that the law could be upheld on a single basis of preventing other crimes and harms:

> I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments.

Justice Souter did not state that the law should not be upheld on the basis adopted by the plurality, but that, even if that were not part of the justification, the law should be upheld for the singular reason he embraced. According to the plurality, the governmental interest in "protecting societal order and morality" justified Indiana's proscription against total nudity in such commercial businesses.

Though Justice Scalia concurred in the judgment that upheld the Indiana statute, even assuming some expressive element may be present that would be overcome by substantial governmental interests, his opinion rejected the need for any application of First Amendment analysis, finding the law to be "a general law regulating conduct and not specifically directed at expression".[7] Under Justice

stated: "All the Court said in *Barnes*, in both the plurality opinion and in the opinion of Justice Souter, was that an anti-nudity law which is satisfied by the wearing of pasties and a G-string constituted minimal intrusion on the expressive content of dancing and was the minimum requirement necessary to achieve the state's purpose." (Emphasis added.)

[7] *Barnes* at 580.

Scalia's analysis, the law should be subject only to rational basis analysis.

Therefore, all five Justices constituting the majority agreed that the indecent exposure law as applied to public stripping was a valid, constitutional restriction of nude conduct in such public businesses. The Pennsylvania Supreme Court chose to disavow *Barnes*, affording no precedential weight to the majority judgment nor to the plurality opinion or to either of the separate concurrences by Justices Souter or Scalia. *Amici* maintain that the State's interests are substantial enough to justify the minimal restrictions on whatever minimal expressive element was alleged by the dancers or their employers, if any exists or is assumed *arguendo*.

B. The Test Used by the Pennsylvania Supreme Court to Determine Precedential Value in Plurality Decisions

The Pennsylvania Supreme Court in holding no rationale of the *Barnes* majority governed its decision, disregarded this Court's prior instructions relative to interpreting plurality decisions, finding intermediate level of scrutiny not applicable, but rather strict scrutiny to be the standard of review. In reaching this conclusion the Court below applied the following test which can be found at 719 A.2d at 278:

> .... a majority of the Court must be in agreement on the concept which is to be deemed the holding. It is certainly permissible to find that a Justice's opinion which stands for the "narrowest grounds" is precedential, but only where those "narrowest grounds" are a sub-set of ideas expressed by a majority of other members of the Court. The mere finding that one Justice expressed a narrower belief than others does not dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent. (Emphasis added.)

Amici submit that this requirement of a "majority concept" is erroneous in these circumstances, noting that the Court below provided no authority for this proposition.

Applying this novel standard, the Pennsylvania Supreme Court determined that the *Barnes* 3-1-1-(4) decision would only be binding in so far as a majority of eight Justices "agreed" that, as the Court below phrased it: "[T]he act of dancing nude, with its attendant erotic message, is an expressive act entitled to First Amendment protection."[8] The State Court then went on to hold that the governing rationale of *Barnes* is actually that of the dissent by Justice White, with whom Justices Marshall, Blackmun, and Stevens joined. The dissenting opinion found the governmental purpose behind the law to be content-based, in that it was designed "to protect viewers from what the State believes is the harmful message that nude dancing communicates".[9] The dissent then further determined that the law was unconstitutional because it would fail a strict scrutiny analysis.

Amici do not agree with the Supreme Court of Pennsylvania's requirement that "a majority of the Court need agree on a concept before that concept can be treated as binding precedent" nor that the sole precedent in *Barnes* is a finding that nude dancing is protected speech. Rather, your *amici* submit that the majority judgment that such public indecency laws are valid and that an intermediate level of scrutiny would be sufficient analysis for balancing any

[8] *Pap's A.M.*, 719 A.2d at 276.
[9] *Barnes* at 591.

arguable First Amendment concerns is the precedent that has been established in *Barnes*.

II. No Matter Which *Barnes* Rationale is Deemed to be Persuasive, the Result of *Barnes* has Precedential Effect.

Amici submit that, even if there is no "controlling" rationale, that in no way undermines the result of *Barnes* being accorded precedential value. Since five Justices have clearly agreed on the specific result and reached a majority judgment on the issue before this Court, that result should be regarded as binding on lower courts, regardless of whether any rationale can fairly be considered authoritative on its own or in conjunction with other stated reasons.

Amici further submit that it was improper for the lower Court, faced with the *Barnes* plurality decision which had garnered a majority agreement on the result, to have chosen instead to follow the dissenting rationale and to have come to a contradictory result on identical constitutional facts. *Amici* would argue that lower courts must adhere at a minimum to the principal of prior resolution in *stare decisis* which requires that any specific result, espoused by a clear majority of this Court, be controlling in substantially identical cases.[10]

Amici contend that adherence to prior determinations in similar cases is essential to the principles of certainty and uniformity underlying our system of justice. *Amici* assert that the Court below did not meet its responsibility of looking to the majority judgment, the controlling plurality, and the concurring opinions contained in *Barnes* in order to ascertain the common views of the majority of this Court to sustain the constitutionality of the Erie ordinance.

[10] 80 Colum. L. Rev. at 769-770.

Amici note that, traditionally, only the results of plurality decisions were considered authoritative.[11] *Amici* maintain that, if this Court finds no opinion of the majority of the Court to be controlling, at a minimum, the result of *Barnes* should be upheld, *i.e.* that an Indiana type law is constitutional and, therefore, the legally similar Erie ordinance also be upheld as constitutional.

III. The Plurality Opinion of Justices Rehnquist, O'Connor, and Kennedy in *Barnes* is Controlling Precedent.

In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court stated the test for determining the controlling plurality opinion in First Amendment cases:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ...." *Gregg v. Georgia*, ...

The Court of Appeals for the Sixth Circuit in *United States v. Marks*, 520 F.2d 913 (6th Cir. 1975) was faced with reviewing a post-*Miller* trial of an obscenity offense that occurred before the decision in *Miller v. California*, 413 U.S. 15, 24-25 (1973). The Court of Appeals concluded that only the "*Miller* Test" need be provided to the jury, rather than the test formulated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The Sixth Circuit was of the opinion that the *Memoirs* plurality was not binding and that *Miller* did not significantly change the law established in *Roth v. United*

[11] Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 448 (1992).

States, 354 U.S. 476 (1957).[12] This Court reversed in *Marks v. United States*, 430 U.S. at 192-93, holding that *Memoirs*, not *Roth*, stated the law of obscenity prior to *Miller*, and that the defendant was entitled to jury instructions under *Memoirs*, and to the benefits, if any, of a charge under *Miller*. In discussing the precedential value of the plurality opinion in *Memoirs*, this Court stated in *Marks*, at 193-94:

> Three Justices joined in the controlling opinion in *Memoirs*. ... The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards. Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions. *** *Memoirs* therefore was the law. *Miller* did not simply clarify *Roth*; it marked a significant departure from *Memoirs*. [Emphasis added.]

In *Marks, supra*, 430 U.S. at 193, this Court looked to *Gregg v. Georgia*, 428 U.S. 153 (1976), where the Court at that time was faced with interpreting the precedential value of *Furman v. Georgia*, 408 U.S. 238 (1972), a plurality decision, in which five Justices held the Georgia death penalty statute unconstitutional. Justices Brennan and Marshall concluded that capital punishment was unconstitutional *per se* and Justices Douglas, White, and Stewart concurred on the ground that the statutory procedures involved in the Georgia statute were unconstitutional.

After the *Furman* decision was handed down, the State rewrote its death penalty statute to comply with the narrowest holding in *Furman* and corrected its procedural requirements. Thereafter, this Court was faced with determining the constitutionality of the new law in *Gregg v.*

[12] 520 F.2d at 919-20.

Georgia, supra, and interpreted the precedential effect of *Furman* to be the narrowest rationale that the death penalty is not unconstitutional *per se* but that the Georgia statute was unconstitutional because of the procedural infirmities in that statute.[13]

Amici submit that this Court should similarly hold that the majority judgment and controlling plurality opinion of *Barnes* are binding precedent upon the Supreme Court of Pennsylvania in the instant case, as this Court in *Marks* did with the majority judgment and plurality opinion of *Memoirs*.

Examining the *Barnes* opinion should, under the *Gregg* test, eliminate the dissent as binding. Likewise, the individual opinions of Justices Scalia and Souter should also be eliminated as singularly binding, in light of the controlling plurality opinion. *Amici* would assert another ground for following the *Barnes* plurality. Rather than following only the concurring opinion of a single Justice, as stated in the first part of the *Gregg* test, the precedent should lie in the "opinion of those Justices". (Emphasis on plural supplied.) *Gregg's* reference to Justices could be more than semantic and be taken logically as meaning more than one, for the reason that the opinion of a single Justice should not set the standard of precedentiality, to the exclusion of the other Justices who join and concur in the plurality opinion or majority judgment of the Court. The future course of American jurisprudence should not be controlled by the opinion of a single Justice, who states neither the majority judgment nor the plurality opinion of the Court.

[13] This Court has generally regarded the narrowest ground as the rationale offered in support of the result that would affect or control the fewest cases in the future. *See* 80 Colum. L. Rev. 756, 764, n. 31 (1980), discussing the *Gregg* Court's treatment of *Furman*.

Amici further submit that there is a difference between a plurality decision that establishes a rule or a test, from a plurality decision that sets a general judgment that a law is valid on its face or as applied. In the first instance, the narrowest ground is important to identify in order to arrive at the test or rule of law that is only as broad as necessary to decide the matter. In the second instance, if the law is valid, its constitutionality is not dependent on any one of the reasons given, but is valid for any or all of the reasons given in support of the general judgment.

In the present case, both concepts apply. These *amici* assert that the general judgment which is binding in *Barnes* is the majority judgment that upheld a state public indecency law prohibiting the exposure of private parts in public places as facially valid and as applied to commercial nude "dancing" in bars and strip joints. Furthermore, the rule or test flowing from the controlling plurality opinion in *Barnes* is that whatever First Amendment concerns are raised by claims of expression during the act of stripping can be tested under an intermediate level of scrutiny, rather than strict scrutiny, and are met under these circumstances by the substantial governmental interests present.

In *Barnes*, at 568, the plurality accepted as constitutionally sufficient the governmental interest in protecting societal order and morality, stating: "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the State is defined as the authority to provide for the public health, safety and morals, and we have upheld such a basis for legislation."[14]

[14] *Amici* note other cases where the Supreme Court has upheld the protection of order and morality as a sufficient governmental interest. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973), where this Court stated: "In deciding *Roth*, the Court implicitly accepted that a legislature could legitimately act on such a

IV. Nude Exhibitions of Human Private Parts During Strip Shows Should Not be Declared "Protected Speech" Under the First Amendment, and this Court Should Clarify its Dicta in this Regard.

One of the major uncertainties that arises from the language in *Barnes, Schad v. Borough of Mount Ephraim*, 425 U.S. 61 (1981), and *California v. LaRue*, 409 U.S. 109 (1972), and led to the conclusion by the Supreme Court of Pennsylvania below, is the manner in which this Court has assumed for the purposes of argument that there may or might be, under some circumstances, some expressive element to strip-joint nude dancing that could constitute protected expression under the First Amendment. *See Barnes*, 501 U.S. at 565-66.

Without finding that such nude exposures of the female breasts and genital areas before a consenting audience for commercial exploitation purposes in a bar-room or juice-bar strip show is actually First Amendment protected expression, this Court has applied an *O'Brien* or *Clark*[15] test to hold that, even if such commercial nudity had some expression entitled to be treated as if it were protected speech, it would meet a substantial governmental interest test in being prohibited or restricted by such common law public indecency laws as Indiana's. This is especially so in light of the minimal limitations for "pasties and G-string" allowed by

conclusion to protect 'the social interest in order and morality'." In *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), this Court clarified its position: "The law, however, is constantly based on notions of morality, and if laws representing essentially moral choices are to be invalidated under the Due Process Clause, the Courts will be very busy indeed."

[15] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

the authorities under the Indiana statute in *Barnes* and explicitly imposed by the Erie ordinance in the instant case.[16]

This Court should take this opportunity to clarify that commercial sexual exploitation of nudity in strip-bars is not itself expression protected by the Constitution as speech, even though it would be constitutional to restrict it under the substantial interest level of scrutiny test if it were.

The Pennsylvania Supreme Court found that a strict scrutiny standard was required because it found that the nude conduct was expressive speech.[17] This is an improper extension of this Court's *arguendo* assumptions that, even if it did and if the correct level of scrutiny were attached to it, whatever expressiveness might be present can be overcome by the state's substantial governmental interests in imposing limited, reasonable restrictions on the conduct involved.

This Court has had other occasions to reverse federal Constitutional misconceptions arrived at by the courts of the states. The Pennsylvania Supreme Court's erroneous conclusion in finding that "the act of dancing nude, with its attendant erotic message, is an expressive act entitled to First Amendment protection"[18] is a misapplication of the federal Constitution, in the same category as the similar conclusions corrected by this Court in some of the major First Amendment cases in the recent past, including:

New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715, 717 (1981):

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[16] *See Pap's A.M.*, 719 A.2d at 276. The Erie ordinance states: "In order to avoid being in a 'state of nudity', a female person over the age of ten years of age would have to wear, at a minimum, what are commonly known as 'pasties' and a 'G-string'."

[17] *Pap's A.M.*, 719 A.2d at 276.

[18] *Id.*

> "Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment" *Id.* at 717;

New York v. Ferber, 458 U.S. 747, 752, 763, 765, 773-74 (1982):

> "We hold that §263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection." *Id.* at 765.
>
> "Because §263.15 is not substantially overbroad, it is unnecessary to consider its application to material that does not depict sexual conduct of a type that New York may restrict consistent with the First Amendment. As applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth." *Id.* at 774.;

New York v. P.J. Video, Inc., 475 U.S. 868, 870, 871, 875-76 (1986):

> We think, and accordingly hold, that an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally." *Id.* at 875.
>
> Applying the Gates standard to the affidavits in the instant case, we think it clear beyond peradventure that the warrant was supported by probable cause to believe that the five films at issue were obscene under New York law. *Id.* at 876.;

Arcara v. Cloud Books, Inc., 478 U.S. 697, 701, 705-07 (1986):

> [W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in Minneapolis Star. This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.

Your *amici curiae* respectfully submit that this Court should clarify the misconception arrived at by the Court below and declare that the type of commercial exploitation of nudity restricted in the instant case by the Erie ordinance is pure commercial conduct that, like the prostitution in *Arcara v. Cloud Books, Inc.*, was found unintitled to Constitutional protection under such a narrowly tailored law. As stated in *Arcara*, at 705:

> [T]he sexual activity carried on in this case manifests absolutely no element of protected expression. In *Paris Adult Theatre I v. Slaton*..., we underscored the fallacy of seeking to use the First Amendment as a cloud for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words "sex" and "books."

Your *amici* further submit that it is similarly fallacious to conclude that strip-joint type nude dancing is "protected speech", as a matter of law, even though it can be regulated for substantial governmental reasons, if the courts assume that it had some measure of expressive element for purposes of analysis.

Amici would submit that First Amendment values should not be invoked in the instant case by merely linking the words "dancing" and "nude." It is the nudity that customers pay pruriently to watch, not the dancing. If the "erotic" dance is the assumed expressive element, as the Court below presumed, then the pasties and a G-string will not interfere with the dance, though it could interfere with the profits of those who pander the nudity. As this Court has so often concluded, prurience is not a serious value and, in fact, pandering to prurience is the evidentiary proof that the claimed value is not serious. *Ginzburg v. United States*, 383 U.S. 463, 467-68, 475-76 (1966); *Hamling v. United States*, 418 U.S. 87, 130 (1974); *Splawn v. California*, 431 U.S. 595, 597-98 (1977); *Pinkus v. United States*, 436 U.S. 293, 303-04 (1978). In *Splawn*, at 598, this Court recognized that he who pruriently looks at pornography, like he who watches strippers bare their body parts on stage, "looks for titillation, not for saving intellectual content".

V. Conclusion

Based on the forgoing reasons, your *Amici* contend that it was error for the Pennsylvania Supreme Court to hold the Erie public indecency ordinance unconstitutional in violation of the First Amendment. Further, *amici* argue that *Barnes v. Glen Theatre, Inc.* should be afforded precedential weight as to 1) it's specific majority result, that a state public

indecency law prohibiting the exposure of private parts in public places is facially valid and as applied to commercial nude "dancing" in bars and strip joints; and 2) the plurality determination that, assuming *arguendo*, First Amendment concerns are raised by claims of expression during the act of stripping, these can be tested under an intermediate level of scrutiny and are met under these circumstances by the substantial governmental interests present.

Your *amici curiae* therefore pray that this Honorable Court will reverse the judgment below of the Supreme Court of Pennsylvania.

Respectfully submitted,

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